ORIGINAL

No. 93-839 (2)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

GEORGE VOSE, DIRECTOR,
DEPARTMENT OF CORRECTIONS,
Petitioner

v.

THOMAS P. BOWLING,

Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION

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42 pp

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REVIEW A CASE AT A STAGE WHEN SUCH REVIEW WILL NOT RULE OUT A SUBSEQUENT PETITION IN THE SAME CASE AND DENIAL OF THE PETITION WILL PRECLUDE MULTIPLE REVIEWS.

II. WHETHER IT IS PROPER TO DENY A DEFENDANT THE RIGHT TO CALL AN ALIBI WITNESS ABSENT A FINDING OF WILLFUL MISCONDUCT.

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OPINIONS BELOW

Petitioner seeks review of Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993). In that case the First Circuit of Appeals reversed the decision of the United States District Court for the District of Rhode Island, Bowling v. Vose, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13, 1992), denying respondent's petition for a writ of habeas corpus. Respondent, defendant Thomas Bowling, sought relief from the decision of the Rhode Island Supreme Court, State v. Thomas P. Bowling, 585 A.2d 1181 (R.I. 1992).

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §§ 1254, 1257 and 2254 and Sup. Ct. R. 10(a) and 10(c). Respondent contests the appropriateness of the exercise of this Court's jurisdiction under Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On January 19, 1989, after a jury trial in the Providence County Superior Court in which he was convicted of first-degree arson, respondent Thomas Bowling was sentenced to fifteen years in prison.

Bowling appealed to the Rhode Island Supreme Court, claiming, inter alia, that the trial judge's exclusion of a proffered alibi witness deprived him of his right to present a defense under the Sixth Amendment to the United States Constitution. That appeal was denied on January 31, 1991. State v. Thomas P. Bowling, 585 A.2d 1181 (R.I. 191).

Bowling filed a petition for a writ of certiorari in this Court on May 1, 1991, which petition was denied on June 10, 1991. He thereupon filed, in September, 1991, a petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island, which petition was denied on November 13, 1992. Bowling v. Vose, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13, 1992).

On November 18, 1992, Bowling appealed the District Court's ruling to the United States Court of Appeals for the First Circuit. In an opinion by Circuit Judge Torruella dated September 10, 1993, Bowling v. Vose, 3 F.3rd 559 (1st Cir. 1993), a three-judge panel of the Court of Appeals held unanimously that the trial judge's refusal to allow Bowling to present an alibi witness did violate his Sixth Amendment rights, but remanded the case to the United States District

Court for a determination as to whether that violation was sufficiently prejudicial to warrant habeas relief, a test which the court analogized to the federal harmless-error rule. The State of Rhode Island's petition for rehearing was denied on October 20, 1993, after which the State obtained a stay of the Court of Appeals mandate and petitioned this Court for a writ of certiorari.

STATEMENT OF FACTS

Late on Saturday evening, June 7, 1986, the Pawtucket, Rhode Island, fire department was called to a fire at 502-504 Pawtucket Avenue. Shortly thereafter, Thomas Bowling was arrested, charged with first-degree arson and indicted.

Bowling's counsel filed a request for discovery, which entitled the State to file a reciprocal request for discovery and notice of alibi. It did so and, with respect to the issue of a possible alibi, provided the following particulars, as it was required to do:

Date of offense: June 7, 1986

Time of offense: 2300-2400 hours

Place of offense: 502-504 Pawtucket Avenue, RI

At trial, the State's posture vis a vis the time of the offense was consistent with its pretrial notice to Bowling. During voir dire the prosecutor stated that "at approximately 1:00 to 1:30 p.m. (sic - presumably she said or intended to say, and was understood to mean, 11:00 to

11:30) ... this defendant did commit the crime as charged...." Trial Transcript, p. 8 (hereinafter "T. Tr."); in her opening statement the prosecutor said the fire "took place ... at approximately 11:30, 11:45 that night." T. Tr., 21. One of the State's witnesses, Investigator Donald M. Byrne, testified on direct that the fire had been discovered at 11:46 P. M.

Up to that point -- i.e., through the direct testimony of Investigator Byrne -- neither the prosecution nor the defense had reason to concern themselves with the whereabouts of Bowling before 11:00 P.M. On cross examination, however, Investigator Byrne testified that his observations of the fire's travel from the basement staircase, coupled with his determination that while the fire had been set, the arsonist had not used any accelarant or flammable material, led him to conclude that the fire had been burning from one-half to three-quarters of an hour before it was discovered. T. Tr., 61, 72; Exhibit B. If Byrne's testimony that the fire was discovered at about 11:46 P.M. was to be believed, that would place the start time at 11:01 P.M., still within the parameters of the notice the State provided the defense in its request to be notified of any alibi defense.

The Fire Marshal's Report, however, Exhibit B, which the Court of Appeals concluded "would seem to be the most definitive evidence" of when the fire was reported, Bowling v. Vose, 3 F.3rd 559 (1st Cir. 1993), at 560, note 2,

stated the fire was reported by "an unknown male" at 11:34 P.M. One-half to three-quarters of an hour before 11:34 P.M. would make the crucial time, insofar as a potential alibi defense was concerned, from 10:49 to 11:04 P.M., a much smaller and earlier window of opportunity than the 11:00 P.M. to 12:00 M. time-frame provided by the State to the defense and articulated by the prosecutor and the State's witnesses during trial.

In the light of this new time-frame, a statement taken from a Doris Palmieri, Bowling's common-law wife, considered together with the testimony of a Peter Brown, a State witness who had placed Bowling at the scene of the fire at 10:34 P.M., which time was precisely established, coincidentally, by an unrelated fire in a dumpster in the vicinity reported at that time, took on new significance. Ms. Palmieri, who had since died (of causes unrelated to the fire), had told the police that she and her sister, unidentified by name, had been picked up in Providence by Bowling and taken back to the scene of the fire, which was her home, arriving shortly after it was discovered. That meant that sometime after 10:34 P.M. Bowling left Pawtucket and drove to Providence to pick up Palmieri and her sister and then drove back to Pawtucket, a feat which, under the most optimistic projection of how much time such a trip would require, would have put him close to the 11:04 P.M. parameter of the new time-frame.

Bowling's counsel identified Ms. Palmieri's sister as

one Jeannette Fagundes, located her and interviewed her. She revealed that Bowling's excursion was even longer than Palmieri's statement indicated: Bowling had not taken her and Ms. Palmieri directly back to Palmieri's home in Pawtucket (the scene of the fire), she said, but rather had first dropped off Ms. Fagundes and a roommate at their home at a different address in Providence. Exhibit E. As a result, he was prepared to argue, even if Bowling left Pawtucket precisely at 10:34, when he was placed there by Brown, he could not have arived back at the scene of the fire during the time it was started: 10:49 P.M. to 11:04 P.M.

Bowling's counsel thereupon filed an answer to the State's request for alibi, identifying Ms. Fagundes as an alibi witness and representing to the court that, in the light of the profferred testimony, "The prudent conclusion was that ... [Bowling] was absent from the scene from about 10:45 till about 11:30." Exhibit E; T. Tr., 233-6. The prosecutor objected to the proposed testimony, claiming that the defendant "concocted some other story to put some witness here at the eleventh hour," that the admission of the proposed testimony would leave "a gaping hole" in the prosecution's case and that the defendant had not complied with the rule requiring him to respond to the State's request for notification of intent to rely on an alibi defense within 21 days after receipt of discovery from the State as required by the State's discovery rules.

Alternatively, the prosecutor stated she would withdraw her objection to the testimony of Ms. Fagundes if she were allowed to introduce the statement of the then-deceased Ms. Palmieri in rebuttal. T. Tr., 240-1.

The trial judge, stating that Ms. Palmieri's statement was sufficient to suggest to the defense that it might have an alibi witness, whether or not the identity of that witness was known, and that the defense should have so informed the State, excluded the proffered testimony, concluding it was "the only reasonable sanction." T. Tr., 248. The defendant, he said, "seized upon this tact (sic) having heard the state's entire case and the state had rested." T. Tr., 247. He did not address the issue of the new, earlier and smaller time-frame.

Bowling's appeal to the Rhode Island Supreme Court was denied, the court agreeing with the trial judge that Bowling was dilatory in notifying the State of his alibi defense. That court also ignored the issue of the new time-frame revealed by the cross-examination of Byrne, simply referring to Byrne's testimony on direct that the fire was discovered at 11:46 P.M. and started thirty to forty-five minutes before that.

At the hearing in the United States District Court on Bowling's habeas petition, his counsel testified that he did not know his client had an alibi defense until after Byrne testified, that he was surprised by Byrne's testimony that the fire had started from one-half to three-quarters of an

hour before it was discovered, that he did not speak to Ms. Fagundes until after the State rested and that he did not willfully conceal alibi evidence. Transcript of Hearing on Habeas Petition in the Federal District Court for the District of Rhode Island, February 20, 1992, pp. 11-12, hereinafter "H. Tr." The District Court Judge nevertheless denied Bowling's petition, concluding that the case "fits neatly into the requirements of Taylor v. Illinois [400 U.S. 484 (1988)]." The United States Court of Appeals for the First Circuit disagreed, finding that the trial judge's refusal to allow Bowling to present an alibi witness did violate his Sixth Amendment rights, but remanded the case to the United States District Court for a determination as to whether that violation was sufficiently prejudicial to warrant habeas relief. Rather than face the harmless error issue, the State petitioned this Court for a writ of certiorari.

I. THIS COURT SHOULD DECLINE TO REVIEW BOWLING BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" TO DO SO AND REVIEW AT THIS STAGE WILL NOT RULE OUT A SUBSEQUENT PETITION IN THE SAME CASE; DENIAL OF THE PETITION, ON THE OTHER HAND, WILL PRECLUDE MULTIPLE REVIEWS.

Although petitioner argues at length its disagreement with the First Circuit Court of Appeals resolution of the chief substantive issue raised by this case -- i.e., whether the trial judge's refusal to allow Mr. Bowling to call an

alibi witness was, under the facts and circumstances of his trial, a constitutionally justifiable sanction -- it does not address that court's ruling, citing Brecht v. Akmanson, ____ U.S. ____, ____, 113 S. Ct. 1710, 1714 (1993), that the case be remanded to the district court for a determination as to whether that error "had substantial or injurious effect or influence in determining the jury's verdict."

In its preamble to Sup. Ct. Rule 10, "Considerations Governing Review on Writ of Certiorari," this Court makes it clear that review on writ of certiorari "is not a matter of right, but of judicial discretion. A petition ... will be granted only when there are special and important reasons therefor." Petitioner cites no reasons at all why this Court ought to review this case, let alone "special and important reasons," it merely cites subsections (a) and (c) of that rule. A careful reading of those subsections, however, in the light of the decision of the court of appeals, makes clear that certiorari is inappropriate, unnecessary and a potentially wasteful use of this Court's limited resources:

> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this

Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. (Emphasis added.)

The words "decision" and "decided" are emphasized because the they make it clear that, in the main, conflicts in decisions -- i.e., final resolutions of real disputes between parties -- warrant this Court's time and attention; court pronouncements not rising to that level of conclusiveness and finality do not. In this case, while the court of appeals concluded that the trial judge's refusal to allow Bowling to call his alibi witness deprived him of his rights under the Sixth Amendment, it also remanded the case to the district court for a determination as to whether that error was sufficiently prejudicial to warrant habeas relief.

Both issues -- whether Bowling was deprived of his constitutional rights under the Sixth Amendment and, if so, whether that denial was sufficiently prejudicial to warrant reversal of his conviction -- are peculiarly fact-intensive and fact-driven. As can be seen from a reading of the Statement of Facts, supra, the two Rhode Island Courts and the two federal courts hearing this case are not in agreement about those facts; an inquiry into the issue of prejudice, requiring as it would an inquiry into all the

evidence, may well resolve some of those differences. Three possibilities suggest themselves: this Court denies the petition; this Court grants the petition and rules in favor of the State; this Court grants the petition and rules in favor of Bowling.

* If the petition is denied and the district court concludes the error was not so prejudicial, the State's conviction would be reinstated; while Bowling might still petition this Court for review at that stage, his posture would make it difficult for him to mount a convincing case for certiorari, the question of whether the error was sufficiently prejudicial being so fact-laden as to call for great deference to the district court. In any case, this Court would review the case once, rather than twice.

* If the petition is denied and the district court concludes the error was sufficiently prejudicial to warrant reversal, the State would then be in a position to petition this Court for a writ of certiorari in the light of an extended analysis of all of the evidence, for and against conviction, which analysis would likely facilitate a determination by this Court as to whether or not Taylor v. Illinois, supra, requires reversal. Again, this Court would hear the case once.

* If the petition is granted and this Court decides, in spite of the disagreements concerning the factual backdrop against which the alibi witness was prevented from testifying, that Taylor requires reversal, the case would,

presumably, still have to be remanded for a determination of the question of prejudice. After that determination is made, the case could well present itself to this Court for further review. This Court could find itself hearing the case a second time.

* If the petition is granted and this Court decides, in spite of the disagreements concerning the factual backdrop against which the alibi witness was prevented from testifying, that Bowling was not denied his constitutional rights, the case will be over.

In short, while granting the petition allows for the possibility that, in spite of the factual disagreements among the lower courts, this Court might nevertheless dispose of the case once and for all, it also may require this Court to hear the case a second time. Since the facts will likely have been more fully explored by the time the case presents itself to this Court for a second review, the Court may well find itself revisiting its earlier judgment. On the other hand, denial of the petition insures that this Court will not have to review the case more than once, and that its one review will be conducted in the light of the final and most complete analysis of the facts.

It is respectfully suggested that there are no "special and important reasons," in the parlance of Rule 10, for this Court to review this case before both the Taylor issue and the question of prejudice are decided below.

II. IF THIS COURT DECIDES TO REVIEW BOWLING IT SHOULD

UPHOLD THE COURT OF APPEALS APPLICATION OF TAYLOR TO THE FACTS OF THIS CASE.

A. THE CRUX OF THE STATE'S ARGUMENT WITH BOWLING IS THAT THE COURT OF APPEALS DISREGARDED HISTORICAL FACTS FOUND BY THE STATE COURT

The State's brief makes three arguments: (1) that the First Circuit Court of Appeals, by finding that Bowling could not have anticipated the proffered alibi testimony during the time within which the State's discovery rules required him to notify the prosecution of his intent to call an alibi witness, disregarded a finding of historical fact made by the State court; (2) that it mis-applied Taylor; and, (3) that it ignored state rules of criminal procedure.

A synopsis of the latter two arguments, however, reveals that they are premised on, and largely variations of, the first argument. The State's argument numbered "II" begins by summarizing a defendant's rights under the Sixth Amendment (pp. 17-18), points out that alibi notice rules do not violate those rights (pp. 18), discusses Taylor (pp. 18-19), and reiterates the State's complaint with what it calls the Court of Appeals "transformation of ... [the] facts as they were found below." (P. 20.) It then cites and discusses Miller v. Fenton, 474 U.S. 104 (1985), for what it teaches on the issue of the appropriate role of state and federal courts "on such matters of historical fact as the length of the interrogation and the defendant's

familiarity with Miranda warnings ...." (P. 21.) Finally, the argument concludes with another extended analysis of the differing views of the State courts and the court of appeals on "the facts." (Pp. 21-24.)

The State's argument numbered "III," ostensibly about the State's discovery rules, begins by describing those rules, emphasizing the liberality with which they were fashioned and have been interpreted (pp. 24-27), but concludes with another explication of the State's view as to what it asserts are the historical facts deserving of the deference of the court of appeals. E.g., according to the State, "[t]he record reveals that when viewed in its proper context, the fire inspector's opinion indicated his belief that the fire began after 11:00 p.m., the time provided in the State's request for alibi" (p. 27); whatever prejudice the defendant suffered by virtue of the alibi witness's exclusion was "self-inflicted" (p. 28.); the defendant, quoting the State court, "seized upon this [alibi] having heard the state's entire case and [after] the state had rested" (p. 28, State v. Bowling, 585 A.2d at 1184); and, again quoting the State court, "the defendant employed a last minute switch in tactics" (p. 28; 585 A.2d at 1185).

B. THE COURT OF APPEALS DID NOT DISREGARD FINDINGS OF HISTORICAL FACT MADE BY THE STATE COURTS

The State cites Burden v. Zant, 498 U.S. 433 (1991), and Demosthenes v. Baal, 495 U.S. 731 (1990) (pp. 14-15),

for the proposition that state courts are entitled to deference by the federal courts in their determination of historical facts. In Burden the court of appeals reversed a clearcut finding by the state court that a witness had been granted immunity; in Demosthenes a state court determination that the defendant had intelligently waived his right to pursue post-conviction relief was overturned. The Court of Appeals disagreement with the State courts regarding the various conclusory findings described in II. A, supra, overturned no such concrete finding of fact; rather, it was a result of an analysis of the undisputed historical facts in the light of the teachings of Taylor.

The only other "historical fact" cited by the State as purportedly disregarded by the Court of Appeals was that court's finding that "the trial court not only failed to make any explicit finding of willful misconduct, it seemingly concluded to the contrary." (P. 16.) In support of that proposition the State cites the very same Rhode Island Supreme Court findings discussed above, to wit, that Bowling "seized upon this [alibi] having heard the state's entire case and [after] the state had rested," that Bowling "employed a last minute switch in tactics during the course of his trial," and that any resultant prejudice resulting from his inability to call his alibi witness "was largely self-inflicted." (P. 17.)

But a close reading of these findings demonstrates how far short they fall -- even if they are assumed to be

correct -- of the necessary finding of willful misconduct. Of course Bowling seized upon his new-found alibi defense after having heard the state's entire case and after the state had rested; that mere statement of what happened is far from a finding of misconduct. On the contrary, if one takes the same view of the evidence as did the Court of Appeals, Bowling was entitled to do just that. The accusation of a last-minute switch in tactics is just another way of putting the same complaint -- and equally neutral in its implications: Why not switch tactics if the unanticipated testimony of one of the State's witnesses, Byrne, when viewed in the light of a document already in evidence, the Fire Marshal's report, suggests the defendant may have an alibi? Bowling's counsel would be derelict if he failed to do so.

The finding that the prejudice resulting from the inability to call the witness was self-inflicted is not neutral; it clearly assigns responsibility for his predicament to Bowling and his counsel. But it also falls far short of a finding of willful misconduct. The mere fact that the trial judge said he was "not persuaded that [offering an alibi witness] was the defendant's original intention....," as the Court of Appeals properly pointed out, "would not be indicative of bad faith or misconduct." 3 F.3d at 565, n. 6.

The only relevant fact which would properly be termed an "historical fact" within the meaning of Burden and

Demosthenes is the time, never determined, that the fire started. The State argues that the Rhode Island Supreme Court "noted in its opinion" -- which is far short of a finding of fact, historical or otherwise -- that Byrne's testimony itself placed the start of the fire in the 11:00 P.M. to 12:00 M. time frame Bowling was notified of in the discovery material provided him by the State. (P. 15.) The Court of Appeals, it contends, "mischaracterizes" the testimony of Byrne by taking it out of the context in which it was related. "[T]he inspector's testimony," the State continues, "when viewed in its proper context, did not place the starting time of the fire outside the time frame specified by the alibi request.... Never, at any point during his trial, was ... [Bowling] confronted with evidence which exceeded that time frame." (P. 16.) But that argument simply ignores the inconvenient existence of the Fire Marshal's report which, as we have seen, and as the Court of Appeals recognized, read together with Byrne's testimony regarding how long before discovery the fire was likely to have been started, is precisely such evidence, and Bowling's counsel understood it to be such.

Although concluding that the start time in the Fire Marshal's report was more definitive on the issue than Byrne's opinion, the Court of Appeals made no finding as to when the fire started either. Instead, it made clear, 3 F.3d at 560-561, n. 2, that it considered important neither its own nor the State court's view on that question but

rather the fact that, since the fire could have been reported either at 11:46 or at 11:34, and "... [Byrne's] testimony is reasonably open to the interpretation that the fire had been started thirty to forty-five minutes before it was actually discovered" (emphasis added), Bowling's counsel, combining that new information with the earlier starting time in the Fire Marshal's report, had "a new defense." 3 F.3rd at 561. The Court of Appeals properly concluded that Bowling could not have anticipated this "new defense" until he heard Inspector Byrne testify.

C. THE COURT OF APPEALS CORRECTLY APPLIED TAYLOR

Failing to convince the Court of Appeals that the State court's conclusory and equivocal findings were tantamount to findings of willful misconduct on the part of Bowling and/or his counsel, the State argues (p. 23), "[a]lternatively, the lack of any finding of deliberate misconduct on the part of defense counsel does nothing to buttress the Court of Appeals' holding," citing this Court's rejection, in Taylor, of the argument that a defense counsel's lack of candor should not be imputed to his client.

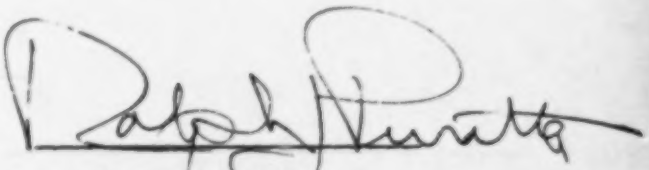
But this Court said clearly in Taylor that its holding therein was limited to "the specific facts of this case," 484 U.S. at 402, that "the case fits into the category of willful misconduct in which the severest sanction is appropriate" -- pointing out, further, that the trial judge suspected that testimony was being fabricated -- and that

"... alternative sanctions [to exclusion] are adequate in most cases...." Some examples of misconduct that may warrant exclusion, according to the Court, are fabricated excuses, dishonest clients, over-zealous defense counsel and evidence of a pattern of discovery violations. 484 U.S. at 413-14, 417. None of these have been suggested to be present in this case either by the State court or the State's brief. The State's suggestion that there was a lack of candor in the instant case, and that it rose to the level of willful misconduct, is simply a restatement of its other claims in different garb.

CONCLUSION

The State of Rhode Island's petition for a writ of certiorari should be denied; if this Court grants the petition, however, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,



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APPENDIX

EXCERPTS FROM TRIAL TRANSCRIPT

real reason and not one of those frivolous reasons that I defined for you, what I define as frivolous, so please keep that in mind.

I will now ask Miss Mancuso to give you the date and time and place of the incidents out of which the charge against Mr. Bowling arose and to read you a list of prospective witnesses who may testify.

MISS MANCUSO: May it please the Court, ladies and gentlemen, the State alleges on June 7, 1986, at approximately 1:00 to 1:30 p.m., at 504 Pawtucket Avenue, this defendant did commit the crime as charged, as the Judge read in the indictment, that's in the City of Pawtucket.

The names you will hear associated with this case are not necessarily witnesses. First one woman who is deceased, Doris Palmieri; Peter Brown; Mildred and Gerald Coutu; Tammy Miguel; Thomas Miguel; Joseph Casalino; Sergeant Kenneth Ryan of the Pawtucket Police Department; retired Lieutenant Edmund Farrell of the Pawtucket Police Department; Fire Fighter Doire; Mr. Louis DeMelo; and from the Fire Marshal's office, Mr. Donald Byrne.

THE COURT: Thank you, very much. Do any of you ladies and gentlemen know any of the witnesses just mentioned and/or the defendant that has just been

circumstantial case for the fire at 504 Pawtucket Avenue. Mr. Thomas Miguel will take that witness stand, and he will tell you his relationship to the defendant, that at one point in time his now late mother-in-law was dating and living in common law as the wife of this defendant; hence, it was his father-in-law, so to speak, and he will tell you how earlier that afternoon or earlier that evening he saw this defendant start a fire in the dumpster in the back yard, and he stopped him. He went downstairs and he assisted him, and he said something to the effect of, "What the hell are you doing?" And you will hear Mr. Bowling's response, and you will hear why earlier that evening he tried to set a fire in the dumpster and was stopped. You will hear also the other actions of Mr. Bowling that evening, and then you will hear about the fire that took place later on that evening, at approximately 11:30, 11:45 that night.

Ladies and gentlemen, you will also hear from Tammy Miguel. Now, Miss Miguel is about 17 years old now. She will tell you that she still sees her grandfather, so she calls him, and she will tell you at one point in time how she told of conversations she had with this defendant regarding how he set the fire, or why he did.

Then Mr. or Mrs. Coutu will testify, and they will

MR. ANDERSON: Riser?

A (Continuing) The riser. Thank you, very much. The riser is burned right through.

Q And is that on the second and third step in that area?

A Yes.

Q Now, did you also check for any kind of incendiary devices?

A Yes.

Q Now, describe to the jury what an incendiary device is.

A Well, there's so many. It could be something as simple as a candle that's set in paper so after it burns down, a half hour later it burns down, it catches the paper on fire. There are hundreds of different devices that can be used. I never found anything like that. What we do automatically in anything other than an accidental fire is we take evidence from the area. In this case I took two cans of debris right from this area, put it in -- these are clean cans that have never been used for anything else, and we mark them a..d send them down to URI to be analyzed, the purpose of that being if there's any -- if they find any flammable, gasoline or thinner or anything like that.

Q Did they find any gasoline or thinner or anything like that in this case?

A No, they found nothing, no.

Q Is it fair to say in some fires that you investigated, when you respond, you can smell gasoline or you can smell some kind of flammable accelerant?

A Yes, you can.

Q And in this case I assume you sniffed to see if you could smell such a thing?

A That's correct.

Q Did you smell any?

A No.

Q And indeed the report that was returned to you from the laboratory was that upon their analysis no flammable, no flammables were discovered in the debris that you sent?

A Yes.

Q Aside from the investigation that you did that evening and which you have described in court, did you follow up on this or did someone else?

A I originally followed up. I was part of a few interviews, but I had to leave on I believe the 10th of that month for California, so I turned the case over to an investigator who works with me, Gerald Leddy, L-E-D-D-Y.

MR. ANDERSON: Thank you. Nothing further.

MISS MANCUSO: May I?

THE COURT: Yes.

REDIRECT EXAMINATION BY MISS MANCUSO:

Doris Palmieri indicated when she was picked up from the Lithuanian Club, that was when, I guess, the defendant told them not to sleep in the building. Did I read that correctly?

MR. ANDERSON: Your Honor, what I intended to focus on in this argument was that on June 9th, at the Pawtucket Police Department, Doris Palmieri told the Pawtucket police that on the night in question after 10:00 p.m. she was at, quote, a club in Providence with her sister and that the defendant, quote, picked up my sister and I at the club.

Now, what I find significant, Your Honor, is that whoever took this statement, I don't have a witness, from the police department, apparently did not ask her, "Where is this club in Providence? Who is your sister, what is her name?" and what happened to the sister. Had those questions been asked, the police, I contend, would have learned her sister's name is Jeannette Fagundes. "When Mr. Bowling picked us up at the club, he dropped my sister, Mrs. Fagundes, off at her apartment." They would have learned that that apartment is just west of River Street on Chalkstone Avenue, and they would then have known that this defendant couldn't have set that fire, Your Honor. I contend that this document and this witness, now that the State has notice of Jeannette

Fagundes, is exculpatory evidence. If I don't put it in, they're obliged to put it in. This proves this man didn't set that fire.

THE COURT: It doesn't prove anything the way it stands right now, Mr. Anderson; it doesn't prove anything.

MR. ANDERSON: It proves after the dumpster fire, which is already in evidence, Fire Fighter Doire stated that fire came in about an hour before the main building fire. We know the main building fire was reported around 11:30. Mr. Doire -- witness Peter Brown testified that Mr. Bowling was present when the fire department responded to the dumpster fire at about 10:30. The police knew that; Mr. Brown reported that to them back in June.

The police next know from eyewitness testimony that the defendant was present at about 11:30 when the fire is raging out of control. Had the police discovered the name and circumstances of the episode concerning Doris Palmieri and her sister, Jeannette Fagundes, they would have realized that it would require a good 15 minutes to travel from Pawtucket Avenue, somewhere a few blocks off of North Main Street, all the way across town to Smith Street to the bar, then down and up Chalkstone Avenue past River Street to drop the sister off, then travel

back with Doris to the apartment, meaning that he was absent for at least -- I would say the prudent conclusion was he was absent from the scene from about 10:45 till about 11:30.

Now, there is nothing in the State's discovery that indicates that the police or the fire fighters ever bothered to think and to notice exactly when this fire began. The State's answer --

THE COURT: Which fire?

MR. ANDERSON: The main fire. The State's answer, request for alibi, as I just noticed this morning, states as a time period twenty-three hundred-twenty-four hundred hours, meaning eleven to twelve p.m. I take it that means, if it were thought through, but I doubt that it was, that they conclude therefore the fire began sometime during that hour. We now know with a little more specific evidence from Inspector Byrne in his opinion the fire started approximately one half hour before the report came in, in other words, about eleven o'clock. This is stuff that is exculpatory that is now in the possession of the State. I don't think it can be constitutionally kept out, and so far as the Rules of Discovery goes, I could have filed an answer and said, "Not at this time, not at this time," and that was my position. I did not -- if necessary, I will take an

THE COURT: No, you ought to let him put it in, and if you don't let him put it in, you ought to put it in yourself. I think that's what he said.

MISS MANCUSO: If that's what he said, that's fine, but I don't think that's my obligation, Judge, to be on the eleventh hour sitting here with evidence that he's developed over the weekend. That's not what the rules say, that's not what the Supreme Court of the United States says, and most importantly, that's not what Doris Palmieri said. That's the crucial thing here. Read Doris Palmieri's statement. She's back at the scene of the crime when she is told by the defendant.

Now, if we want to put in evidence here, then let his Miss Fagundes testify and let her take the stand, and let us put in Miss Palmieri's statement. We're in a position where Mrs. Palmieri is deceased, and now over the weekend the defense comes up with the sister, and now the sister is going to testify and leave, I suggest to the Court, a hole in the State's case. Back when the fire was investigated, Miss Palmieri was alive, there was no reason to talk to the sister. So it's not exculpatory; there's nothing exculpatory about it. The police weren't negligent in investigating. It's just that now Mrs. Palmieri can't take the witness stand and tell the truth so the defendant concocted some other

story to put some witness here at the eleventh hour, and that's not fair, that's not what the rules say, and that's not what the Supreme Court of the United States says. I can't call Doris Palmieri like the Pawtucket police could speak with her back at the time of the crime. It's no alibi, the State would argue, as you take a reading of the statement, but if Mr. Anderson is going to let me put Doris Palmieri's statement in in full to rebut that, I have no objection to Miss Fagundes testifying.

THE COURT: I am toying with letting you reopen to put that statement in. I think it's a perfectly proper thing to do under our new Rules of Evidence and I think even under the old rules.

MISS MANCUSO: Well, I think certainly if you allow Jeannette Fagundes --

THE COURT: I haven't decided yet.

MISS MANCUSO: First of all, on the objection for the discovery, if you overrule it and it goes to the substantive question, there's a gaping hole here, and there's no question it's not the State's contention he didn't leave the scene at some time and come back again, but it's different --

THE COURT: Putting that argument aside, what's relevant here is what the facts are and what inferences

of one Doris Palmieri dated June 9, 1986 wherein she recounts, among other things, of having been picked up by the defendant together with her sister on the night of the fire. The sister is the proposed witness Fagundes.

If the defendant were serious about using Fagundes as an alibi, it seems reasonable to assume he would have identified her to defense counsel, and defense counsel's argument that her identity has just come to his attention avails the defendant nothing, especially since the State has rested having presented evidence in this admittedly circumstantial evidence case without notice and concern that defendant had even the possibility of an alibi defense. This possibility was raised by the Palmieri statement, and the Court is of the opinion that defendant, if he had any intention of relying on alibi defense, he had the obligation to inform the State of that intention even if the identity and/or the whereabouts of the witness was unknown. Frankly, the Court is not persuaded that such was the defendant's original intention but rather he seized upon this fact having heard the State's entire case and the State had rested.

I would point out that if the defendant were to be allowed to present the testimony of Fagundes, the Court

would almost certainly allow rebuttal evidence as the only fair thing to do, among which would be the statement of Palmieri, since deceased, which contains other evidence prejudicial to this defendant.

It is a given that the promulgation of Rule 16 is one of the most liberal discovery mechanisms in the nation. It is designed to permit a defendant to acquire all relevant information to be relied upon by the State to support the accusation so that an adequate defense may be prepared by the defendant in accordance with his due process rights. The rule, however, is not a one-way street because once a defendant has availed himself of its provisions, the State is accorded the reciprocal right to discovery, specifically including possible alibi information within the prescribed time limits. Failure by either the defendant or State to comply, gives rise to the alternative sanctions listed above.

In this case to allow the evidence sought to be presented, though late, and grant a continuance to the State to meet it, is not a reasonable alternative because the State has rested, a key factor in this Court's decision. One must remember that the Court is also responsible to ensure the orderly administration of justice. Therefore, the only reasonable sanction is the refusal to allow the testimony into evidence.

EXCERPTS FROM HEARING TRANSCRIPT

rested?

A I did not know the name of the witness until I, until Mr. Bowling told me the name, which was after the state rested, shortly after the state rested Friday morning. This was Friday afternoon, I believe.

Q Did you know that you had an alibi from Mr. Bowling at the time the fire started until after the Fire Marshal testified, or even a possible alibi?

A No.

Q After he testified?

A Still no, because I didn't. I knew Doris Palmieri was deceased. I didn't know the location of that club. I didn't know the time frames involved. No, I didn't.

Q When did you know?

A When I knew? When I met with Janet Fernandes.

Q Okay, and why didn't you inform the state of this possible witness until after the state rested?

A Well, I didn't know of the witness until Mr. Bowling told me. The Fire Marshal testified, I believe, on Wednesday. It is true I didn't run to my client and ask him about this until Friday. There was a lot of other evidence in the case, witnesses, two alleged admissions he had made, and I was just busy with that.

Q Did you ever ask Mr. Bowling before that Friday the

name of this sister?

A No, I didn't.

Q Had you ever spoken to Fagundes before that Friday?

A No.

Q Did you consider calling any witnesses before the trial began?

A No.

Q Did you consider the fact that the fire may have started before it was discovered?

A No, I, I was not thinking in those terms.

Q Why not?

A I was actually surprised by their answers. All the evidence seemed to indicate that he was there when the fire started. That was a common sense reading of the witness statements.

Q Who decided to use this alibi defense, you or Mr. Bowling?

A That was my decision entirely.

Q You never asked Fagundes' name before Friday; did you willfully attempt to conceal alibi evidence to prejudice the state?

A No.

MS. HARDIMAN: That's all I have.

CROSS-EXAMINATION BY MR. GORHAM:

MR. GORHAM: Walter Gorham for the State of

EXHIBITS

EXHIBIT "B"

STATE OF RHODE ISLAND

DIVISION OF FIRE SAFETY

COMPLAINT # 2-2542

1. COMPLAINANT: LIEUTENANT EDMOND H. FARRELL
PAWTUCKET FIRE DEPARTMENT

2. OWNER (S)

COUTU, GERALD W. & MILDRED R.
5 MEADOW AVENUE
JOHNSTON, RHODE ISLAND

3. OCCUPANT (S)

OCCUPIED COMMERCIAL AND
MULTI-FAMILY BUILDING
502-504 PAWTUCKET AVENUE
PAWTUCKET, RHODE ISLAND

4. Type of Investigation	5. Location of Loss	6. Day and Date
Fire - Occupied Commercial and Residential Bldg.	502-504 Pawtucket Avenue Pawtucket, Rhode Island	Saturday, June 7, 1986 @ 11:34 P.M.

7. Narrative of Investigation:

Fire determined to be of incendiary origin caused extensive damage to this three-story brick commercial/residential building with basement, located in a densely populated residential neighborhood of moderately priced homes. The building is occupied by two stores and nine apartments.

Scene examination conducted by Investigator DONALD M. BYRNE and Lieut. FARRELL reflected fire originated in the basement, at the front stairway leading to the first floor. Fire extended from this area vertically and horizontally to the partitions of the first floor which housed a Beauty Salon and Laundromat. Both businesses received heavy damage; the remainder of the building received heavy smoke and water damage. No electric wires in immediate area of point of origin and no connection between point or area of origin and hot water heater or furnace in basement. All accidental causes eliminated.

Photographs taken by PAWTUCKET POLICE DEPARTMENT. Evidence seized and submitted for analysis to U.R.I. LABORATORIES.

Subject arrested and charged with ARSON 1st DEGREE. Case awaiting court action.

Insurance: CONROY & DALEY AGENCY, Providence, RI; CAMBRIDGE MUTUAL.

8. Origin	9. Status	10. Investigator	11. Date of Report
INCENDIARY	PENDING (Arrest Made)	GERALD A. LEDDY	JUNE 18, 1986

EXHIBIT E

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND	:	
	:	
VS	:	P1/86-2703
	:	
THOMAS BOWLING	:	

DEFENDANT'S ANSWER TO STATE'S REQUEST FOR DISCOVERY

1. Street map, City of Providence.

2. Keeper of Records, Pawtucket Fire Department and/or investigator Gerald A. Leddy (see State's answer to discovery) that a dumpster fire was reported at 502-504 Pawtucket Avenue at 10:36 p.m. June 7, 1986; that the building fire was reported at 11:34 p.m.

3. Jennette Fagundes, 965 Chalkstone Avenue, Providence, RI, that she is the sister of Doris Palmieri, that she has known the defendant to have lived with her sister for many years and often visited them at their apartment on Pawtucket Avenue; that on the evening of June 7, 1986 she and her sister were at the Lithuanian Club on Smith Street, Providence, RI along with her roommate Loretta Brady (now deceased); that sometime after 10:00 p.m. that evening her sister called the defendant to come pick her up; that the defendant came to the Lithuanian Club and picked up herself, her sister and her roommate, drove to her house at 965 Chalkstone Avenue, dropped off Loretta and herself and then left for home (Pawtucket Avenue) with Doris; that she visited Doris after the fire and saw the condition of the apartment; that Doris died near the end of June, 1986 that she saw improvements the defendant had made in the apartment.

4. Angie Miguel, 269 Sayles Avenue, Pawtucket, RI, that when she left her apartment June 7, 1986 early in the evening her husband Thomas and her daughter Tammy were still there; that she went to Rides Grill, Pawtucket, that later that evening she learned of the fire by a telephone call, that she then went to her apartment building and saw the firefighters and saw her mother, Doris Palmieri sitting with another tenant across the street from the apartment building on the sidewalk.

THOMAS BOWLING
By his Attorney

Dale G. Anderson
Assistant Public Defender

CERTIFICATION

I hereby certify that on September 26, 1988, I delivered a copy of the within Motion to the Department of Attorney General, Providence, Rhode Island.

Dale Ordem